U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: FEB 06 2009

SRC 07 036 51605

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Mari Johnson

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner provides food products. It seeks to employ the beneficiary permanently in the United States as a market research analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, the petitioner submits a statement and additional evidence. For the reasons discussed below, the petitioner has not overcome the director's concerns.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA Form 9089 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted for processing on September 8, 2006. The proffered wage as stated on the ETA Form 9089 is $67,600 annually. On the ETA Form 9089, Part J, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of August 4, 2003.

On the petition, the petitioner listed its establishment date as July 15, 2003. The petitioner did not list its gross or net annual income. Finally, the petitioner indicated it had four employees. In support of the petition, the petitioner submitted a profit and loss statement for January through September 2006 listing a net income of $12,272.64.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on November 30, 2006, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the

proffered wage beginning on the priority date. The director also requested evidence of wages paid to the beneficiary in 2005 and 2006.

In response, the petitioner submitted Schedule C of the sole member's Internal Revenue Service (IRS) Form 1040 U.S. Individual Income Tax Return for the petitioner for 2005 reflecting a net loss of $22,496 and a profit and loss statement for all of 2006 reflecting a net income of $18,979.89. The petitioner also submitted the beneficiary's IRS Form W-2 Wage and Tax Statements for 2005 and 2006 reflecting wages of $36,000.00 and $36,000.12 respectively. The petitioner further submitted a letter from the general manager of the property advising that it had been damaged in 2005 during Hurricane Wilma, was closed for two weeks in 2005 after the storm and has been undergoing repairs through 2006.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on February 7, 2007, denied the petition.

On appeal, the petitioner asserts that it had previously submitted evidence of its commitment to increasing development of the company for 2007. The petitioner, organized as a limited liability company, further asserts that the assets of its sole member should be considered as if the petitioner were a sole proprietorship. The petitioner submits bank statements for its sole member and a new 2006 profit and loss statement for the petitioner reflecting a net income of $38,292.73. The difference in net income between this statement and the previously submitted statement is due to a decrease in the cost of goods sold. The petitioner provides no explanation for this discrepancy. We note that neither profit and loss statement is audited.

The unaudited financial statements submitted with the petition and on appeal are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

Moreover, as stated above, the two profit and loss statements for all of 2006 show two different values for cost of goods and, thus, produce a very different net income figure. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The record does not contain objective evidence resolving this discrepancy. While the petitioner submitted a transaction detail by account in support of the new profit and loss statement, the transaction detail is not audited and there is no evidence this document is more credible than the information on the original profit and loss statement. Moreover, there is no explanation for how the figures on the profit and loss statement were derived from the transaction detail.

The record also contains another unresolved inconsistency. Specifically, while the petitioner claimed on the Form I-140 petition under penalty of perjury that it employed four workers, the transaction detail and profit and loss statement reflect no wages beyond those paid to the beneficiary.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), U.S. Citizenship and Immigration Services (USCIS) will first examine whether the petitioner employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2006, the year the priority date was established. Rather, it paid the beneficiary $36,000.12. Thus, it must establish its ability to pay the difference between that amount and the $67,600 proffered wage, or $31,599.88.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Federal courts have recognized the reliance on federal income tax returns as a valid basis for determining a petitioner's ability to pay the proffered wage. *See Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986). *See also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1083 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should be considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[1] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

As stated above, the petitioner needs to demonstrated an ability to pay the difference between the wages paid and the proffered wage, $31,599.88. The petitioner did not submit the sole member's IRS Form 1040, which Schedule C, for 2006 although this form might well have been available on April 11, 2007 when the supplement to the appeal was submitted. The petitioner also did not submit an annual report or audited financial statement for 2006. As stated above, the unaudited profit and loss statement has little evidentiary value. Regardless, the initial profit and loss statement covering all of 2006 shows a net income of only $18,979.89. The petitioner did not submit a balance sheet. Thus, as noted by the director, the petitioner has not established what its net current assets were at the end of 2006.

In light of the above, the director's decision was correct based on the evidence in the record at that time. On appeal, the petitioner submits a new unaudited profit and loss statement for all of 2006. This new statement reflects a net income above $31,599.88. Nevertheless, for the reasons stated above, the petitioner has not established that this profit and loss statement is more credible than the one submitted initially.

Regarding the petitioner's assertion that we should consider the assets of the petitioner's sole member, the petitioner is not a sole proprietorship, a business in which one person owns all the assets and "owes all the liabilities." Black's Law Dictionary 1398 (7th ed. 1999). Rather, the petitioner is a limited liability company, a company that is "characterized by limited liability." *Id.* at 275. As the sole member is not liable for the petitioner's debts, her assets cannot be considered. Specifically, USCIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft,* 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003).

Even if we were to consider the sole member's assets, and we reemphasize that it would be improper to do so, the petitioner has not submitted the requisite documentation required for a sole proprietorship. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Without the sole member's complete IRS Form 1040, we cannot determine her adjusted gross income. The petitioner has also not provided any evidence regarding the sole member's expenses and dependants.

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[1] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The petitioner has not demonstrated that any other funds were available to pay the proffered wage beyond the wages paid to the beneficiary in 2006 and, at best, the $18,979.89 listed on the petitioner's first profit and loss statement (although even this statement is unaudited).

Finally, we acknowledge the assertions that the petitioner's location was damaged in 2005. The priority date, however, is 2006, and we have not considered the petitioner's inability to pay the proffered wage in 2005 adversely. As for any lingering impact in 2006, the overall circumstances do not warrant a favorable finding in this matter.

Matter of Sonegawa, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2006 was an uncharacteristically unprofitable year for the petitioner.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2006. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.